

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2132

To be argued by
T. BARRY KINGHAM

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2132

CARMINE GALANTE,
Petitioner-Appellant,

—v.—

THE WARDEN, METROPOLITAN CORRECTIONAL
CENTER and THE UNITED STATES PAROLE
COMMISSION,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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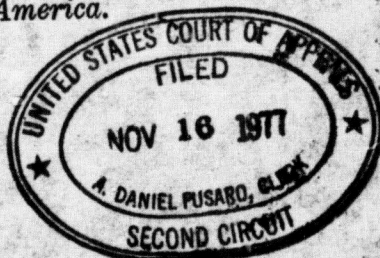


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Carmine Galante appeals from the dismissal, on October 27, 1977, of a petition for writ of habeas corpus and denial of the writ by the Honorable Robert J. Ward, United States District Judge for the Southern District of New York. By his petition, Galante claimed that parole revocation proceedings had been initiated in violation of his due process rights by issuance of a parole revocation warrant on October 5, 1977. In denying the writ, Judge Ward held that no due process right had been violated and that Galante was not entitled to be released on bail during the parole revocation proceedings.

A motion for bail pending this appeal was denied by a panel of this Court (Mansfield, Friendly and Hays, C.J.J.) on November 4, 1977.

Statement of Facts

A. The Parole Revocation Proceedings

Carmine Galante was convicted of major narcotics violations after a jury trial in the Southern District of New York in July, 1962. He was sentenced by Judge MacMahon to a term of twenty years. On January 24, 1974 Galante was mandatorily released after serving twelve years of his sentence.* He then came under the supervision of the United States Probation Office in the Southern District.

In August, 1977 parole officials received extensive surveillance reports about Carmine Galante from local and federal law enforcement officers. The Northeast Regional Office of the United States Parole Commission was thereafter notified that, in violation of standing conditions of parole, Galante had been associating with several known criminals over the period of a year. Included among the criminals with whom Galante had been associating was, for example, Joseph "Joe Beck" DiPalermo, who, like Galante, has an extensive criminal conviction record, and whose association with Galante in 1943 resulted in the revocation of Galante's state parole. After reviewing the allegations, Joseph A. Nardoza, Regional Parole Commissioner, issued a parole revocation warrant for Galante's arrest on October 5, 1977. Nardoza considered the initiation of revocation proceedings by summons rather than warrant, 18 U.S.C. § 4213(a), but properly determined that the frequency and seriousness of the alleged violations and Galante's prior criminal

*Galante was not paroled; he was released at the expiration of his sentence, less statutory allowance for good time. 18 U.S.C. § 4163. Because violations of mandatory release are treated in the same fashion as parole violations, 18 U.S.C. § 4164, the term "parole" will be used herein for ease of reference.

record (four convictions * and two parole revocations in addition to the 1962 case) militated against the summons procedure.

The parole revocation warrant was mailed from Commissioner Nardoza's office in Philadelphia to the U.S. Marshal in the Southern District on October 5. After it arrived on the afternoon of October 7, federal agents were unable to locate Galante. Arrangements were then made on October 8 with Galante's lawyer to have Galante surrender on October 11. At counsel's request, no attempts were made to execute the warrant during that weekend.

Following his surrender on October 11, Galante was offered an immediate preliminary parole revocation interview pursuant to 28 C.F.R. § 2.48, but the interview was adjourned until October 18 at Galante's request, to permit him to review the charges with counsel and to prepare for the hearing. At the preliminary interview, which took place as scheduled, Galante was confronted with witnesses to substantiate the charges; he had the opportunity to question his present and former parole officers, and to present whatever evidence he wished. On October 21, the hearing officer reported to the Regional Commissioner that probable cause existed to believe that Galante had violated the conditions of his mandatory release by associating with a total of six known criminals ** on eighteen occasions over the period of a year. Of the

* Including convictions for petit larceny (seven-month sentence) in 1926; attempted armed robbery and assault (2½-5 years) in 1926; attempted robbery (12½ years) in 1931; and a six-month sentence for reckless driving, in an incident in which a police officer was killed, in 1956.

** Joseph DiPalermo, Vito DiFillipo, Alphonse Indelicato, Joseph Indelicato, Angelo Presenzano and Nicholas Zaffarano, all of whom have extensive criminal records.

twenty-seven specifications for which the hearing officer found no probable cause, twenty related to Galante's associations with one person, Vincent Macaluso, whose arrest record did not reflect any criminal convictions. Galante's lawyer requested that the hearing officer make a recommendation for release pending the remaining revocation proceedings, 28 C.F.R. § 2.48(e), but Probation Officer Hurley recommended that Galante remain in custody.

On October 27, 1977, the Regional Commissioner accepted the hearing officer's recommendation and found probable cause to believe that Galante had violated the conditions of his mandatory release with respect to the eighteen alleged associations with known criminals. A final parole revocation hearing is scheduled for December 14, 1977. 18 U.S.C. § 4214(a)(1)(B).

B. The District Court's Ruling

On the date of his surrender, Galante filed a petition for writ of habeas corpus, brought on by Order to Show Cause, claiming a due process violation because the revocation proceedings had been initiated by warrant rather than summons, and seeking bail during the pendency of the parole revocation proceedings. The case was assigned to Judge Ward, who denied the writ and dismissed the petition on October 27, 1977 following the submission of affidavits, memoranda of law, and extensive oral argument.

In a well-reasoned opinion, Judge Ward held that no due process violation had occurred. The District Court further held that although the court had the discretionary power to admit Galante to bail during the parole revocation process, *Argro v. United States*, 505 F.2d 1374 (2d Cir. 1974), Galante had shown no denial of due process and none of the "unusual circumstances" which must exist

before the District Court would grant bail, an "exceptional measure" in such a case. *Id.* at 1377; *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974). Specifically, Judge Ward rejected Galante's claim that initiation of the parole revocation proceedings by warrant rather than by summons was a denial of due process. Judge Ward properly held that the Commission has broad discretion under 18 U.S.C. § 4213 to determine which method is appropriate. Citing the legislative history and Commissioner Nardoza's affidavit, Judge Ward found that the decision to issue the warrant was based in fact and was made rationally upon a proper review by Mr. Nardoza of Galante's extensive prior criminal record and the frequency and seriousness of the alleged parole violations. Judge Ward also ruled that certain other claims, discussed below, were without merit. (6A-11A).*

ARGUMENT

Galante's Parole Revocation Comports with Due Process; The District Court Properly Denied Bail Pending the Revocation Proceedings.

Judge Ward correctly decided that Galante's right to due process of law was not violated by the issuance of a parole revocation warrant which caused Galante's incarceration during revocation proceedings. Judge Ward also exercised his discretion properly in denying bail, because this case is not so unusual as to permit bail to be granted. In misleading arguments carefully calculated to confuse this Court, Galante attempts to obtain a *de novo* grant of bail by arguing that he is *entitled* to bail. However, this argument overlooks the fact that even where the power

*"A" refers to appellant's appendix; "Br." refers to appellant's brief; and "Tr." refers to transcripts of the argument before the District Court, identified by date.

to grant bail is recognized there is no legal requirement that it be granted in every case. *Argro v. United States*, *supra*, 505 F.2d at 1378. Rather, its grant is a matter within the District Court's discretion, *Id.*; *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955). Judge Ward conclusively and correctly determined that no due process violation had occurred and that therefore Galante was not entitled to bail.

It is settled that there is no federal constitutional right to bail pending revocation of parole. *Argro v. United States*, *supra*, 505 F.2d at 1377; *In re Whitney*, 421 F.2d 337, 338 (1st. Cir. 1970). In *Argro*, however, this Court determined that there may be adequate ground to support a grant of bail in "unusual cases," at least in a bona fide inquiry into whether parole revocation is being conducted pursuant to due process. Yet Galante does not allege, as did *Argro*, that the revocation proceedings themselves are being conducted in violation of due process, nor could he. The preliminary interview officer's report (74A-92A) and other documents before this Court (22A-35A) make eminently clear that all procedural and substantive rights to which Galante is entitled have been scrupulously observed. 28 C.F.R. §§ 2.48-2.50; 18 U.S.C. § 4214. See *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). His sole claim here is that he should not be incarcerated during the proceedings.

A. The Parole Commission acted properly in issuing a parole revocation warrant and, accordingly, there was no denial of due process.

Galante's argument that the Parole Commission abused its discretion in initiating revocation proceedings by warrant is frivolous. As Judge Ward properly held, the decision was premised upon a careful consideration of the facts available to Commissioner Nardoza at the time he issued the warrant, facts which lead to the irre-

futable conclusion that this was a proper case for issuance of a revocation warrant.

Title 18, United States Code, Section 4213(a) provides, in part, that in beginning revocation proceedings, the Commission "may" issue a summons or execute a warrant. The decision to proceed by warrant or summons lies solely in the discretion of the Parole Commission. Neither the statute nor the regulations, 28 C.F.R. § 2.44, provide parameters on the exercise of that discretion. Rather, as Judge Ward noted, Congress recognized that the Commission is in the best position to decide which way to proceed. The Conferees' Report on this new statute states:

"This section provides that the Commission may initiate revocation proceedings using either a summons or a warrant procedure. It is the intent of the Conferees that the Commission should minimize the disruption of the parolee's life in any revocation proceeding. One means by which this intent has been implemented in [sic] giving the Commission discretion to use either a summons or warrant when a condition of parole has [sic] alleged to have been violated. *However, the Conferees recognize that use of a summons for parolees with prior adult or juvenile records may simply be inappropriate.*" Parole Commission and Reorganization Act, H. Conf. Report 94-838, 94th Cong., 2d Sess. 33 (1976) (Emphasis added).

This is not to say that the Parole Commission's exercise of discretion is *completely* unfettered. Obviously, if the decision to proceed by warrant is arbitrary, or based upon irrational criteria, a violation of due process might be made out. Here there was no such violation, however, because the criteria used by Mr. Nardoza were proper and his decision was made upon the recorded facts before him.

Mr. Nardoza based his decision upon a review of Galante's prior criminal record and the number and seriousness of the alleged violations. As to Galante's record, Mr. Nardoza stated:

"a. According to the Pre-Sentence Report dated July 9, 1962, Carmine Galante has a lengthy prior criminal record dating back to the 1920's. This record includes four prior adult convictions and two instances in which Mr. Galante was found to have violated conditions of prior parole releases, one of which was for associating with known criminals." (Nardoza Aff. at 2; 62A).

Consideration of prior record as a prime factor was clearly contemplated by Congress, as the legislative history shows. Moreover, it makes sense that a man in Galante's position, sixty-seven years of age with a record of four prior adult convictions and two prior parole violations, may choose to flee rather than face charges which could reincarcerate him for another four years.

Galante makes two arguments on this point, neither of which has merit. First, he argues that it is unfair for the Parole Commission to consider a 1962 pre-sentence report, which defense counsel then did not have the opportunity to rebut. *Compare*, F.R. Crim. P. 32(c)(3), enacted in 1975. This claim makes no sense because Mr. Nardoza relied upon Galante's *record* as expressed in the report. Galante cannot and does not dispute that he has a long history of serious criminal conduct, which includes the four convictions mentioned by Mr. Nardoza. Therefore, availability of presentence reports in 1962 is irrelevant.

Second, Galante argues that by "prior" adult and juvenile record Congress did not refer to convictions prior to the conviction from which the parolee was re-

leased. Relying on inapplicable language in two dissenting opinions, he claims that "prior" means "subsequent" to parole. (Br. 24). This reasoning defies logical analysis. The likelihood of unexpressed Congressional reliance upon dicta in dissenting opinions is remote, and if Congress had intended to restrict use of the warrant to situations in which a parolee is charged with a crime, it would have so provided. Instead, the statute gives discretion to the Parole Commission, recognizing the inappropriateness of mere summons notice to releases with records like Galante's. All parolees do *not* have prior records, as Galante argues. Indeed, at the time of *his* own first conviction, Galante did not have one. He now has a record of four convictions prior to 1962. Use of a summons for this recidivist is "simply . . . inappropriate." Congress, the Parole Commission, and Judge Ward all recognized that. We are confident that this Court will as well.

With respect to frequency and seriousness of the alleged violations, Mr. Nardoza said:

"b. Based upon the information available to the Commission at this time, the alleged violations of mandatory release by Mr. Galante occurred frequently over the period of approximately one year. The number of these alleged violations and the repeated meetings with the persons involved is an indication that Mr. Galante's behavior, if proven, did not entail merely isolated incidents but revealed a continued pattern that is strongly suggestive of a course of conduct that could pose a threat to society. This is supported in my view, by the fact that Mr. Galante's 1962 conviction was for conspiracy with 28 other persons to violate the narcotic laws". (Nardoza Aff. at 2; 62A).

Judge Ward properly held that Mr. Nardoza's decision, based upon such considerations, was not arbitrary.

Galante attacks Mr. Nardoza's decision on the ground that the allegations are not sufficiently serious to merit proceeding by warrant because they do not amount to criminal charges. While it is true that no violations of criminal statutes are alleged, criminal association is indeed a serious charge. In *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972), this Court upheld the constitutionality of the "criminal association" provision and stated:

"... when a convict is conditionally released on parole, the Government retains a substantial interest in insuring that its rehabilitative goal is not frustrated and that the public is protected from further criminal acts by the parolee. Although a parolee should enjoy greater freedom in many respects than a prisoner, we see no reason why the Government may not impose restrictions on the rights of the parolee that are reasonably and necessarily related to the interests that the Government retains after his conditional release. The restriction here involved is reasonably and necessarily related to the Government's legitimate interests in the parolee's activities and thus does not violate the first amendment."

Here the Government has a substantial interest in preventing repeated criminal conduct by Galante. The association of such a person with other known criminals, as Mr. Nardoza noted, "is strongly suggestive of a course of conduct that could pose a threat to society." It is inconceivable that Galante's repeated association with known criminals could not be considered serious, particularly when viewed in the light of his record and the serious nature of the crime for which he was originally convicted.

Nor is it significant that after the preliminary interview probable cause was as to only eighteen specifications

of criminal association. Judge Ward properly determined that Mr. Nardoza's decision must be viewed in light of the facts available to him at the time the warrant was issued, before the preliminary interview. In any event, as Judge Ward held, "the eighteen violations for which probable cause was found at the preliminary interview would seem more than adequate to support a finding of frequency of violations" (11A, n.3).

Galante also attempts to show that he was denied due process because no parole revocation summons has been issued by Mr. Nardoza's office since the passage of 18 U.S.C. § 4213(a) in March 1976. First, as Judge Ward correctly noted, under the statute and its legislative history the Commission in its discretion *may* determine never to issue a summons in dealing with persons with prior records. Nonetheless, Mr. Nardoza stated that he had considered the use of a summons in several cases, but had "rejected its use after evaluation of the particular facts of each case" (Nardoza Aff. at 2, 62A). Thus, it is clear that Mr. Nardoza has not proceeded arbitrarily, but only after careful consideration of the facts in each case.

For the first time, Galante now attacks the credibility of Mr. Nardoza's affidavit, claiming that it was "the perfect opportunity to fabricate a justification for the implementation of a warrant rather than a summons" (Br. 22). Galante did not so argue in the District Court, but instead rested on the claim that Mr. Nardoza had used the wrong criteria. Galante had the opportunity to rebut, to seek a hearing and to offer evidence (10/14/77; Tr. 117-18), none of which he did after the filing of the Nardoza affidavit. Preferring to argue the law below, he now seeks to argue credibility, and he must fail. Judge Ward's obvious finding of Mr. Nardoza's credibility must be accepted unless clearly erroneous, F. R. Civ. P. 52(a),

and there simply is no evidence to support Galante's claim of fabrication.

Undaunted by the evidence of record, Galante also argues that the Nardoza affidavit fails to respond to the District Court's inquiry. (Br. 22). In requesting the production of evidence by the Government, Judge Ward stated:

"[The Government] may serve and then file with the court an affidavit answering this question: Why did the Parole Commission decide not to proceed by summons in this case? And I suggest giving me as background the general guidelines, if they exist" (10/14/77, Tr. 116).

In response, Mr. Nardoza explained why a summons was not used and outlined the criteria which he had applied in exercising his discretion, and explained Commission procedure. That was a direct reply to the question asked, and Galante's argument to the contrary simply belies the facts.

Finally, in a vain effort to show the arbitrariness of the Commission's actions Galante points to letters written in early 1977 by his attorneys to his parole officers offering their cooperation in "clarifying and correcting any situation" with respect to Galante's parole. (Br. 8, 21; 55A-60A). The letters apparently were generated by newspaper publicity concerning Galante's activities in early 1977. As indicated by the letter of May 10, 1977, counsel was largely concerned about harassment of his client by the media (59A). Galante offers this information now to support his claim that the Parole Commission acted arbitrarily against a man with an "unblemished record and a history of cooperation" (Br. 21). It is significant, however, that surveillance records

of Galante's association with known criminals were not called to the attention of the parole authorities until August 15, 1977. The number and frequency of those associations hardly reflected an "unblemished record" for Mr. Galante.

As Judge Ward recognized (10/14/77 Tr. 95), the Government is under no obligation to notify the attorneys of alleged parole violators or those who are committing crimes that their clients are so engaged. Were there such a requirement, ongoing investigations would be compromised and targets alerted. While offering "cooperation" through counsel, Galante flagrantly and repeatedly violated his parole conditions. Under those circumstances, the Government was not obliged to proceed in any fashion other than by warrant.

In sum, none of Galante's purported due process claims have merit. The discretion to proceed by warrant is vested in the Parole Commission by statute and regulation, and was properly exercised here. Judge Ward correctly held that there was no due process violation.

B. Galante is not entitled to be released for any other reason

Initially, it is important to recall, as this Court did in *Argro*, that customary bail concepts do not apply with respect to requests for release during parole revocation hearings. The presumption of innocence has long since disappeared, and the threat of reincarceration (here for almost four years, 28 C.F.R. § 2.52(c)) may provide strong inducement for flight, *Argro v. United States*, *supra*, 504 F.2d at 1378. Parole is a form of custody, and its violations are breaches of provisions imposed upon convicts, albeit "outside the walls." 18 U.S.C. § 4164. Thus the criteria of the Bail Reform Act, 18 U.S.C.

§§ 3146-48, do not apply here.* The Act provides for release only before trial, presentence and pending direct appeal.** In this regard, as the First Circuit noted in *In re Whitney, supra*, 421 F. 2d at 338, "[s]ince a conviction has been obtained, for example, it is hardly unreasonable to use incarceration pending the revocation hearing to protect society against the possible commission of additional crimes by the probationer". Thus, Judge Ward properly applied other considerations in determining whether to admit Galante to bail: whether this is an "unusual case"; whether there is a violation of due process; and whether it presents "unusual circumstances". *Argro v. United States, supra*; *Calley v. Callaway, supra*. The District Court's rejection of Galante's claims in all three respects was correct.

Although this Court indicated in *Argro v. United States, supra*, 505 F.2d at 1377, that "there may be adequate ground to support [a grant of bail] in unusual cases", there is nothing unusual about this case. We submit that Galant's parole revocation is being conducted in the same fashion as that of any parolee with his record. This Court also noted in *Argro* that bail is appropriate

**E.g.*, 18 U.S.C. § 3146(b):

"In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings".

**Likewise, by denying Galante bail, Judge Ward determined that release is not "fitting" in the context of this habeas corpus proceeding. F.R. App. P. 23(b), and this Court has agreed by denying bail during this appeal. F.R. App. P. 23(d).

during parole revocation proceedings only under what it termed "the most unusual circumstances". *Id.*, at 1378. None exist here.

Galante argues that such circumstances are present here because there is "no probability of flight" (however, there is no evidence to support that claim); because there is a "potential length of time of incarceration without determination" (however, under the present schedule it will be approximately 90 days from onset to final decision); and because Galante has an "unblemished four year record of parole" (however, he stands charged with repeated criminal association).

In any event none of the "unusual circumstances" suggested by Galante bear the slightest resemblance to the circumstances recognized by the Court in *Calley v. Callaway*, *supra*, 496 F.2d at 702 n.1, made applicable here by this Court in *Argro*: namely, serious deterioration of health while incarcerated; short sentences for relatively minor crimes so near completion that extraordinary action is essential to make collateral review truly effective; or possible extraordinary delay in processing a habeas corpus petition. As Judge Ward properly recognized, Galante does not claim the existence of any such circumstances. The writ was properly denied on that basis alone.

Having failed woefully to show any unusual circumstances, and faced with Judge Ward's adverse factual ruling in that regard, Galante now claims for the first time that the standard is inapplicable here, despite this Court's holding in *Argro v. United States*, *supra*. This argument is totally without merit. First, Galante waived this claim by not raising it below, despite the opportunity to do so among the six affidavits and three oral arguments

submitted to Judge Ward. This Court has repeatedly held that such tactics are unavailable:

"The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . and where that party has had ample opportunity to make the point in the trial court in a timely manner, . . . waiver will bar raising the issue on appeal". *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977).

See also *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883 (2d Cir., Sept. 14, 1977); *United States v. Chiarizio*, 525 F. 2d 289, 293-94 (2d Cir. 1975); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966); *United States v. Murphy*, 480 F.2d 256 (1st Cir. 1973). Thus, Galante may not rely on this claim here.

Even if this issue were not waived, however, Galante's argument must fail. In a semantic whirl calculated to confuse this Court with definitions of "special reasons", "special circumstances" and "unusual circumstances", Galante claims erroneously that such tests apply only to bail pending appeal and not to the parole revocation process. This contention ignores the fact that the requirement of demonstrating "unusual circumstances" stems from the fact that *normal* bail considerations do not apply in the habeas corpus setting, as discussed earlier. See *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. 1969). Thus, in *Argro v. United States*, *supra*, when confronted with the issue of bail pending parole revocation proceedings, this Court had to establish a standard by which bail determinations should be made. By analogy to collateral attack cases, this Court properly established a higher standard than that which is found in the

Bail Reform Act. That higher standard, which requires in part the demonstration of "unusual circumstances", is properly applied in cases where—as here—an underlying conviction and sentence already exist and where the threat of re-incarceration is substantial. See *Calley v. Callaway*, *supra*; *Baker v. Sard*, *supra*. Parole revocation proceedings, like post-trial collateral attacks, involve the determination of issues when the presumption of innocence does not exist and when the Government has a substantial interest in preventing the repeated commission of crime by convicted felons. Thus, in *Aronson v. May*, 85 S.Ct. 3 (1964), Justice Douglas discussed the "special reasons" test of Rule 49(4) of the Rules of the Supreme Court. That rule is identical to Rule 23(d), Federal Rules of Appellate Procedure, which requires a showing of "special reasons" to appellate courts before an adverse bail determination in the District Court will be overturned pending review of the denial of habeas corpus relief. Indeed, this Court has already found that no "special reasons" exist here in denying Galante's application for bail pending this appeal.

Yet, neither *Argro* nor *Calley* is based "primarily" on *Aronson v. May* as Galante argues. (Br. 13). Rather, each case points out the applicable analogy by reference to that decision, and each properly sets out the considerations to be used in making bail determinations in their respective situations. In *Argro* this Court pointed out that the same bail considerations which govern in collateral attack cases and appeals from denials of habeas corpus should be used in parole revocation cases, where otherwise no standard would exist.

In desperation, Galante finally attempts to convince this Court to substitute a "substantial question" test for "unusual circumstances." There simply is no substantial question here, and in any event, the existence of a "substantial constitutional claim on which he has a high prob-

ability of success" is only one important factor in deciding whether to grant bail. *Calley v. Callaway*, *supra*, 496 F.2d at 702. Galante argues that Judge Ward issued a certificate of probable cause here because a "substantial" question exists. However, Judge Ward not only did *not* use the term "substantial" (2A) but mistakenly issued the certificate of probable cause, apparently believing it was necessary to permit an appeal. The certificate is required only for appeal from the denial of habeas corpus relief relating to *state* convictions. 28 U.S.C. § 2253; F.R. App. P. 22(b). In addition, Galante claims that there are substantial issues here because it was administratively determined that there is no danger of flight and that Galante's conditions of mandatory release had not been explained to him. (Br. 17). However, these misstatements are garnered not from evidence, but from counsel's *argument* at the preliminary revocation interview.

Nor is Galante entitled to bail because others have received it from the District Court in other cases. Bail is individual, of course, and must be determined on a case by case basis under the circumstances. None of the cases cited by Galante as precedent mandates his release on bail in this case. It is important to recognize that bail itself is unusual in the context of parole revocation proceedings. Galante's statement of "fact" (Br. 6) that "[t]his is the first time since 1976 that a mandatorily released parolee has been denied bail pending parole revocation proceedings, while literally true (*cf. United States v. Bronston*, 409 U.S. 352 (1973)), is disingenuous at best. Galante gives the impression that many such cases exist, when in fact this is only the second time since 1976 that anyone so situated has *sought* bail in the Southern District.*

* In the only other case, *Berardelli v. Taylor*, 77 Civ. 1792 (S.D.N.Y. April 15, 1977), Judge Stewart continued bail for a
[Footnote continued on following page]

C. Galante's remaining miscellaneous arguments are meritless.

Galante's counsel have not been content in this case to address the substantive issues before the District Court or this Court. They have made additional frivolous claims, the very mention of which reflects on the worth of their arguments as a whole. The purpose of these arguments, we submit, is to suggest by innuendo that Galante has been victimized in these proceedings. Nothing could be farther from the truth.

First, Galante is portrayed as a model parolee, who had no notice of the condition of his parole against "criminal association." Even if true, which it apparently is not, this fact has no bearing on the issues here, but is properly a consideration for the Parole Commission in its determination whether to revoke parole. In any event, there is no evidence in the record to support Galante's purported lack of notice. At the preliminary interview it was established that when Galante was released from jail in 1974 he refused to sign the list of conditions, saying he first wished to consult with counsel. Obviously, Galante had to know what he was asked to sign, or his consultation would have been meaningless. Nor is it

defendant who was already on bail pending sentence on an Eastern District conviction. There, Judge Stewart erroneously applied the provisions of the Bail Reform Act to a parolee pending revocation proceedings. Likewise, in *Ciambrone v. United States Parole Commission*, 77 Civ. 356 (E.D.N.Y. February 24, 1977), Judge Neaher determined that bail was appropriate during parole revocation proceedings for a parolee who was *acquitted* of the criminal charge which formed the basis for the violation. These cases hardly require that Galante be admitted to bail because each case of this nature is *sui generis*, as Judge Dooling recognized in *United States v. Schreiber*, 367 F. Supp. 791, 792 (E.D.N.Y. 1973). The cases cited by Galante demonstrate only that the decision to grant bail is discretionary with the District Court, based upon the facts and circumstances of each case.

significant that various parole officers did not review the rules with Galante. The release conditions are printed on the release certificate which Galante received at the time he left jail, and the conditions are binding whether or not Galante signed the certificate. 28 C.F.R. § 2.40 (a). Although given the opportunity, Galante never stated at the preliminary interview that he had no notice of the conditions of his release, nor did he submit an affidavit or testify in the District Court. To the contrary, the very fact that Galante purportedly filed all reports and consulted regularly with his parole officer shows his familiarity with his parole obligations. Finally, Galante has received parole violations on two of his prior convictions, one of which was for criminal association. Let us hear Mr. *Galante* swear he had no notice of his obligations.

Galante's counsel also attempts to obfuscate the issues here by pointing out that some of the information furnished to the Parole Commission was collected by the U.S. Attorney's Office for the Southern District of New York. What possible right of Galante's was violated? It is ridiculous to suggest that responsible prosecutors would ignore evidence of parole violations by a man of Galante's prior stature in crime.* Moreover, there was no direct contact between the U.S. Attorney's Office and Mr. Nardoza, who clearly exercised his judgment independently. Judge Ward properly held that none of Galante's claims in this regard make out a due process violation. Rather, we submit, these arguments are designed only to becloud the issues. We are certain that this Court will not be distracted and will recognize the correctness of Judge Ward's ruling.

*Galante attempts here, as he did in the District Court, to impugn the conduct of Chief Assistant U.S. Attorney William M. Tendy. The Government declines to dignify these claims with anything more than a denial.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

T. Barry Kingham being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *16th* day of *November*, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Roy M. Cohn, Esq.
Saxt, Bacon & Bolan
39 E. 68 St
New York, NY 10021

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

T. Barry Kingham

Sworn to before me this

16th day of *November*, 1977
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
NO. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

